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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ROSS, Defendant and Appellant.	E040010 (Super.Ct.No. FVI020919) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Senior Assistant Attorney General, and Pamela Ratner Sobeck, Supervising Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant was charged with three crimes stemming from the death of his girlfriend's youngest daughter, 25-month-old D.H. The charges consisted of murder (Pen. Code, § 187, subd. (a);[1] count 1); assault on a child under age eight, causing death by means of force likely to produce great bodily injury (§ 273ab; count 2); and felony child abuse or endangerment (§ 273a, subd. (a); count 3).[2] A jury found defendant guilty as charged on all three counts. He was sentenced to 29 years to life in prison,[3] and appeals.

Defendant contends the trial court prejudicially erred in failing to instruct the jury sua sponte on the defenses of accident and justification in all counts and on the lesser included offenses of manslaughter and voluntary manslaughter in count 1. He further claims that the trial court prejudicially erred in failing to "clearly" instruct the jury that felony endangerment as charged in count 3 requires criminal negligence. We find each of these claims without merit.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The information originally alleged a great bodily injury enhancement on count 3 within the meaning of section 12022.7, subdivision (d), but this allegation was dismissed on the People's motion before the charges were read to the jury and evidence was presented.

[3] Defendant was sentenced to 25 years to life on count 2, the principal count, plus a consecutive term of four years (the midterm) on count 3. The court further imposed but stayed a 15-year-to-life term on count 1; however, the clerk's minute order states that a stayed term of 25 years to life was imposed on count 1.

Defendant further contends his four-year term on count 3 should have been stayed under section 654 as a matter of law. We reject this claim. Lastly, defendant claims his abstract of judgment must be amended to reflect that he was convicted of *second degree* murder in count 1 and received a stayed term of 15 years to life rather than 25 years to life on count 1. We agree with this claim; accordingly, we remand the matter to the trial court with directions to amend the abstract and affirm the judgment in all other respects.

II. FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

During the evening of February 4, 2005, defendant and D.H.'s mother, Winter T. (Winter), brought D.H. to the emergency room of the Victor Valley Community Hospital in Victorville. She was unconscious with no pulse and was not breathing. A CT scan showed she had a "major" head injury with severe bleeding in the brain. She was not expected to survive.

D.H. was airlifted to Loma Linda University Children's Hospital (Loma Linda). There, surgery was performed to remove a large portion of her cranium in order to relieve pressure from edema or brain swelling. At the time of the surgery, D.H. was already brain dead or very close to being brain dead. She was completely brain dead when she was taken off life support on February 14, 2005.

During the afternoon of February 4, defendant was at home in the apartment he shared with his girlfriend, Winter, and Winter's three children, D.H., child 1, and child 2, ages two, four, and six, respectively. Defendant regularly babysat the girls while Winter worked her usual 4:00 to 10:00 p.m. shift at a McDonald's restaurant. At approximately

7:00 p.m., defendant called Winter and told her to come home because something was wrong with D.H.

Child 2 was the sole prosecution witness to what occurred in the apartment before D.H. was taken to the emergency room. According to child 2, she and her sisters were watching television with defendant in the girls' bedroom. At some point, D.H. began to cry. Defendant immediately took D.H. out of the bedroom and into the living room. After a time, defendant returned D.H. to the bedroom and laid her on the bed. Child 2 noticed that D.H. did not look "okay." She was no longer crying and appeared to be asleep.

After defendant put D.H. on the bed, he told child 2 to try to waken D.H. Child 2 tried but was unable to waken D.H. After a time, child 2 told defendant she was hungry, and defendant told her to make herself a peanut butter and jelly sandwich. Child 2 recalled that, at some point, defendant called Winter. Winter came home and was upset and crying. They immediately went to the emergency room.

Winter's father, Gary T., lived in Apple Valley. Winter, the girls, and defendant came to live with Gary during 2004. After three to four months, Gary told defendant he had to move out. At that point, Winter decided to move into a motel in Apple Valley with defendant and the girls.

Gary recalled that, at one point while the group was living at the motel, police came to his house looking for D.H. and showed him photos of D.H. with a blackened eye. The next day, Gary saw D.H. with the blackened eye and questioned defendant about it. Defendant claimed D.H. was in the bathroom climbing on a chair when the chair slipped

out from under her and she fell and hit the rail on the shower. Defendant claimed he was in the kitchenette at the time. He said he tried to call 911 from the motel office, but office personnel would not allow him to place the 911 call.

Following that incident at the motel, Winter, defendant, and the girls moved back into Gary's house. Two months later, in November 2004, they moved into an apartment in Victorville. Gary did not see his grandchildren very often after they moved into the apartment. However, he saw D.H. on the Monday before Friday, February 4, the day she was taken to the emergency room for her severe head injuries. According to Gary, D.H. appeared to be fine that day.

While D.H. was being treated at Loma Linda, Gary recalled that Winter was very distraught, but defendant was not crying and did not appear to be upset. Instead, he was angry because he was not allowed into the room to see D.H. Gary recalled that defendant did not want to speak to anyone about what had happened to D.H.

Dr. Mark Youssef was the emergency room physician who treated D.H. before she was transferred to Loma Linda. Dr. Youssef recalled that, when D.H. was brought to the emergency room at around 8:00 p.m. on February 4, Winter and defendant were present. However, neither one of them provided any information concerning D.H.'s injuries or condition despite repeated questioning.

Initially, Dr. Youssef was not aware that D.H. had or may have had a severe head or brain injury. However, he saw that D.H. had no heartbeat and was not breathing. She was immediately intubated and given CPR and various medications in an effort to revive her. As noted, a CT scan revealed a severe hemorrhage in the brain. D.H. was then

airlifted to Loma Linda. Due to the nature of the injury, a report was made to police and Child Protective Services.

San Bernardino County Sheriff's Deputy Kaysie Nunn responded to the emergency room in Victorville to investigate the report of D.H.'s injuries. According to Deputy Nunn, Winter was in shock, crying, and trying to find out about D.H.'s condition. Defendant was not crying or upset, and appeared to be nervous. When questioned by Deputy Nunn, defendant said he had been watching the girls while their mother was at work. He and the girls were in a bedroom watching television. He left the bedroom to go into the kitchen. When he came back, D.H. was not responsive. The next thing he did was call Winter. It was approximately 7:30 p.m. When asked why he did not call 911, defendant said he felt it would be better if he had "Winter deal with it." He specifically denied striking D.H. and said nothing regarding an accident or dropping D.H. Later, at Loma Linda, defendant told Detective Roxanne Logan, "I swear to God I did not have anything to do with it. She just fell asleep and did not wake up."

Deputy Nunn interviewed child 2 at the hospital in Victorville outside the presence of defendant and Winter. Child 2 told Nunn that she, defendant, and her sisters were watching the Disney Channel. Child 1 was hungry, so defendant left the room to go to the kitchen. D.H. began to cry, so defendant took her out of the room. When defendant brought D.H. back, she appeared to be "sick." Child 2 later told investigators that defendant would "pop" her and her sisters on the head and "whoop" them with his hand, hard enough to make them cry. The beatings would "hurt."

Investigator Robert Heard interviewed defendant at the San Bernardino County Sheriff's Department on February 5. Defendant told Heard that Winter left for work around 3:30 to 3:45 p.m. on February 4. The girls were in their room watching television. This time, he said he was in his room watching his own television. Child 2 then asked him to come and watch television with them. When he entered the room, D.H. was on the floor sleeping face down. He picked her up, placed her on the bed, and stayed in the room with the girls. After a time, child 2 said they were hungry and offered to wake D.H. Defendant told her not to wake D.H. Then he changed his mind and tried to wake D.H. himself.

Defendant demonstrated to Heard how he attempted to wake D.H. He shook her a little bit then slapped her cheek with his right hand, but she still did not waken. She did not look "normal" and felt like "dead weight." Then he said, "aw shit, you knew something was wrong," and he attempted to call Winter. He said he did not need to call 911 because Winter was already on her way home. While he waited for Winter, he got some wet towels and tried to wake D.H. with the towels.

Shortly after D.H. was taken to the emergency room, a large bruise in the form of a handprint began to appear on the left side of her face. When asked about the bruise, defendant said the bruising occurred when D.H. fell on the railing of a bathtub sometime before February 4. He denied hitting D.H. on the head and insisted that he did not slap D.H. very hard while trying to awaken her. He also reiterated that he did not cause D.H.'s head injuries by accident or by injuring D.H. out of anger. He later told another officer he thought he had figured out how D.H. received the bruises on her face. When

he attempted to wake her, he was in a panic and he grabbed her over the top of her face like he was grabbing a ball, and he may have "done it too hard."

In a later interview on February 8, officers confronted defendant with the fact they had spoken with child 2 about what occurred in the apartment on February 4, and asked defendant whether he wanted to tell them anything else. In response, defendant asked that Winter be brought into the room. After Winter was brought into the room, he revealed, for the first, time, that he had dropped D.H. as he was holding her over his head. When she fell, he heard a "sickening thud" and he knew her head hit the floor. He again insisted that he never slapped D.H. very hard and only slapped her to revive her.

Winter testified concerning the incident at the motel, before she, defendant, and the girls moved into the apartment in November 2004. Winter returned from work to find that D.H.'s face was swollen. As he told Gary, defendant told Winter that D.H. had fallen off some stackable chairs in the bathroom. After Winter took D.H. for medical attention, police came to speak with her; however, nothing came of the incident and D.H.'s injuries soon healed.

According to Winter, D.H. had no visible injuries when she left for work shortly before 4:00 p.m. on February 4. Earlier that day, Winter and defendant took the girls to the dentist at around 10:00 a.m. D.H. was fine, and played with child 2 while child 1 visited the dentist. D.H. also had a milkshake that morning and ate something after they returned home.

As Winter was getting ready for work, she heard D.H. crying as defendant and child 2 were swinging her in the air. Winter told defendant to stop because D.H. was

frightened. Winter had never heard D.H. cry like that before. She sounded as though she were in pain, but she stopped crying after defendant put her down.

When Winter left for work shortly before 4:00 p.m., she saw that the girls were watching the Disney Channel in their bedroom. Defendant called Winter at work at around 7:00 p.m., saying something was "not right" with D.H. and she was not moving. When Winter arrived home, defendant was holding D.H. in his arms, bouncing her on his chest. D.H.'s arm just fell, like it was heavy, and she did not respond at all to Winter. They immediately went to the emergency room.

Defendant told Winter he first knew something was wrong with D.H. when he told child 2 to wake D.H. because he was making the girls something to eat. However, Winter recalled there was no indication that defendant had been preparing any food for the girls. In fact, when Winter arrived home, child 2 was making herself a peanut butter sandwich.

On February 5, Winter told officers for the first time that D.H. fell in a carport while getting out of a car seat on February 2. Winter thought D.H. had hit her head on the ground or the door jamb. However, D.H. was wearing a big "puffy winter coat" with a hood behind her head, and there was no evidence of even a bump on her head. The length of the fall in the carport was estimated to be 26 inches. Winter recalled that D.H. was perfectly fine after the carport fall. She ate and slept as she usually did.

Winter received numerous letters from defendant after he was arrested. In one letter, defendant said he had lied about dropping D.H. because he wanted child 2 and child 1 to be returned to Winter's custody.

B. *The Prosecution's Expert Medical Testimony*

Dr. Alexander Zouros, the pediatric neurosurgeon who performed surgery on D.H. at Loma Linda in an effort to relieve pressure on her brain, testified as an expert on head injuries to children. According to Dr. Zouros, a "major" force was necessary to produce D.H.'s head injuries. D.H.'s injuries were consistent with a car accident, or having her head slammed with tremendous force against a corner of furniture or a corner of a wall. Her injuries were too extensive to have been caused by a two-to three-foot fall to the ground, or even an eight- to ten-foot fall from above the head of a person over six feet tall.

According to Dr. Zouros, D.H. would have been immediately symptomatic after sustaining her injuries. She would have been severely ill and "probably . . . almost immediately comatose." He said she could have been awake, but she "almost undoubtedly" would have been experiencing severe headaches, vomiting, and extreme lethargy. She also would have been immediately paralyzed on her left side, because the right side of her brain, which generally controls the left side of the body, was edematous.

Dr. Clair Sheridan-Matney, a pediatrician and specialist in child abuse and neglect evaluations, examined D.H. on February 5. She observed that D.H. had a "huge brain injury" which caused so much damage that she eventually became completely brain dead. She also noted a large skull fracture beginning on the right side of D.H.'s head and extending over her ear towards the back of her head. There were observable fragments and some depression. She had a bruise on the left side of her face in the form of a

handprint, and the entire left side of her face was swollen. She also had two subdural hematomas between the bone and over the brain.

In Dr. Sheridan-Matney's opinion, D.H.'s injuries could not have resulted from the carport fall, or that fall in combination with being swung two days later. Nor could her injuries have been caused by a fall from defendant's shoulder, or that fall in combination with the carport fall. Instead, Dr. Sheridan-Matney concluded that D.H. was a victim of abusive head trauma. Dr. Zouros concurred with this opinion.

Forensic pathologist Dr. Frank Sheridan performed the autopsy of D.H. Based on the nature and extent of her injuries, Dr. Sheridan also agreed that the cause of D.H.'s death was abusive head trauma. More specifically, and based on the lack of any evidence that D.H.'s injuries could have been accidentally caused, Dr. Sheridan opined that D.H. died as a result of her head being slammed against a hard surface.

C. *Defense Evidence*

Defendant testified in his own defense. He claimed that while Winter was still at home and after he and child 2 were swinging D.H., D.H. laid down on the floor in her room and proceeded to take what he thought was a nap. After Winter left, defendant went into his room to watch television. After 20 or 30 minutes, child 2 asked him to come into the girls' room and watch television with them. At that point, D.H. was still asleep on the floor.

Then child 1 asked for something to eat. Defendant went into the kitchen to prepare something to eat for the girls. He was still deciding what to prepare when he told

child 2 to wake D.H. Soon afterwards, child 2 returned and said D.H. would not waken. He then told child 2 to go into the kitchen and fix her and child 1 something to eat.

Defendant then made a "decent attempt" to waken D.H. He shook her a little and slapped her in the cheek area. When that failed, he tried to call Winter, but the line was busy. He next undressed D.H., took her to the tub, and splashed cold water on her. He was finally able to reach Winter, and told her to come home. He dressed D.H. and waited for Winter to get home. Although he said his first thought was to call 911, he wanted Winter to know what had happened. He was unaware D.H. had fallen in the carport until Winter told officers about it on February 5.

Defendant denied ever dropping or hitting D.H. He claimed he told detectives he dropped D.H. only because they made him believe Winter would get the other two girls back if he said he dropped D.H. He said child 2 was mistaken when she testified he picked up D.H. and took her into the living room. He said that occurred two or three days before February 4.

III. DISCUSSION

A. *Defendant's Various Claims of Instructional Error Are Without Merit*

Defendant contends the trial court prejudicially erred in failing to instruct the jury sua sponte on the defenses of accident and justification on all counts, and on voluntary and involuntary manslaughter as lesser included offenses to murder as charged in count 1. He also claims the trial court had a duty to "clearly delineate" that felony child endangerment based on medical neglect as charged in count 3 requires criminal negligence. We find each of these claims without merit.

1. The Defenses of Accident and Justification

Defendant contends the trial court had a duty to instruct sua sponte on the defenses of accident and justification on counts 1, 2, and 3, based on "his bathroom fall story, or Winter's carport fall account, or those accounts [together with] his account of slapping and shaking [D.H.] when she inexplicably could not be roused." In essence, he claims that instructions on accident and justification would have allowed the jury to find him not guilty on all counts because he did not have the mens rea necessary to commit any of the charged offenses.

A trial court has a duty to instruct sua sponte on defenses "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) And when a defense negates proof of an element of a charged offense, the defendant need only raise a reasonable doubt of the existence of that fact. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 963.)

Regarding the defense of accident or accident and misfortune, section 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." "The accident defense is a claim that the defendant acted without forming the mental state necessary to make his actions a crime." (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390.)

Regarding justification, defendant relies on *People v. Sargent* (1999) 19 Cal.4th 1206, 1224, where the court observed that felony child abuse, as charged here in count 3, involves the direct "infliction of *unjustifiable* physical pain or mental suffering" on a child and that "shaking or slapping a choking child, whatever physical pain or mental that may involve, *is justified*." (Second italics added.) Thus here, defendant argues that the defense of justification would have allowed the jury to conclude that his act of striking and slapping D.H. in an effort to revive her was *justified* and he was therefore not guilty of felony child abuse or endangerment in count 3.

The crucial point of defendant's argument is that testimony of the medical experts *left open the possibility* that defendant's act of shaking and slapping D.H. in an effort to revive her *could have* resulted in her death or physical injuries when those actions were combined with one or more of the following: (1) D.H.'s fall in the carport on February 2, (2) defendant swinging D.H. on February 4, (3) defendant dropping D.H. in the bathroom on February 4, or (4) D.H.'s fall from the stackable chairs in the motel several months before February 4.

Specifically, defendant argues that the testimony of Dr. Youssef, the emergency room physician, "did not rule out the possibility" that D.H. had a preexisting, undiscovered head injury before defendant shook and slapped her, because her severe skull fracture, which she presumably suffered as a result of the shaking and slapping incident in combination with one of the earlier mishaps, was not readily or immediately apparent to Dr. Youssef or the emergency room staff.

Furthermore, defendant claims that Dr. Zouros, the pediatric neurosurgeon, was "equivocal" on whether D.H.'s severe head injury could have been caused by shaking and slapping her in combination with a previous, undiscovered head injury. Defendant also notes that Dr. Sheridan-Matney admitted that the exact mechanism of brain death was difficult to determine. And Dr. Sheridan, whom defendant calls the "most veteran of the experts," testified there were "no absolutes" and did not suggest that any particular authoritative set of events was the only way of producing D.H.'s ultimate injuries.

We disagree with defendant's view of the evidence. The evidence simply *did not* permit the possibility that defendant's shaking and slapping D.H., in combination with one or more of her other falls or with swinging her, could possibly have resulted in D.H.'s death, injuries, or mental suffering. All of the experts agreed that D.H.'s head and brain injuries were far too severe to have resulted from the carport fall, a fall from defendant's shoulder, or any similar accidental fall, either alone or in combination with defendant's shaking and slapping her in an effort to revive her. Instead, the experts agreed that D.H.'s injuries were caused by slamming her head against a hard object.

Thus here, the evidence that defendant shook or slapped D.H. in an effort to revive her, in combination with the evidence of D.H.'s earlier carport fall or other falls, did not warrant instructions on the defenses of accident or justification.

2. Voluntary and Involuntary Manslaughter

Defendant further contends evidence warranted instructions on the lesser included offenses of voluntary and involuntary manslaughter to murder as charged in count 1. We

disagree that the evidence warranted instructions on either of these lesser included offenses.

A trial court has a duty to instruct on lesser included offenses only when there is substantial evidence that the lesser included offense, but not the greater charged offense, was committed. (*People v. Breverman, supra,* 19 Cal.4th at pp. 154, 162.) Voluntary manslaughter is treated as a lesser included offense to murder. (*People v. Barton* (1995) 12 Cal.4th 186, 199.) "So, ordinarily, is involuntary manslaughter." (*People v. Ochoa* (1998) 19 Cal.4th 353, 422.) "The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

"Malice may be either express or implied. It is express when the defendant manifests 'a deliberate intention unlawfully to take away the life of a fellow creature.' (§ 188.) It is implied . . . 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life' . . . ." (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

(a) *Voluntary Manslaughter*

Malice is negated and a killing constitutes the lesser included offense of *voluntary* manslaughter "only in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense [citations]." (*People v. Barton, supra,* 12 Cal.4th at p. 199.)

Defendant acknowledges there was no evidence to support voluntary manslaughter instructions, based on either heat of passion or unreasonable self-defense. Instead, he argues that, if he injured D.H. at all, "he had to have had a disturbance of his reason which equally dispelled malice," and that manslaughter "acts as a catch-all for absence-of-malice homicides." We disagree.

Even if the evidence supported a reasonable inference that defendant acted *without malice* in causing D.H.'s injuries, this was insufficient to warrant any instructions on *voluntary* manslaughter. There was simply no evidence to support any instructions on voluntary manslaughter.

(b) *Involuntary Manslaughter*

Involuntary manslaughter includes a killing, without malice, "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); *People v. Lewis* (2001) 25 Cal.4th 610, 645; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 (*Evers*).) Defendant relies on *Evers* for the proposition that substantial evidence supported instructions on involuntary manslaughter based on the commission of a lawful act without due caution and circumspection. As the *Evers* court observed, a "lawful act" for purposes of involuntary manslaughter includes noninherently dangerous felonies such as child endangerment, and that the words "without due cause and circumspection" refer to criminal negligence -- unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. (*Ibid*.)

The *Evers* court reasoned: "If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice." (*Evers, supra,* 10 Cal.App.4th at p. 596.) The question in *Evers* was whether there was substantial evidence that the defendant fatally injured his stepson, Michael, without consciously realizing the risk his actions posed to the child's life. (*Ibid*.) The defendant argued there was substantial evidence that Michael's death was the result of the defendant's inexperience as a parent, and not the product of the defendant's conscious disregard of the risk his actions posed to the child's life. (*Id*. at pp. 596-597.) The *Evers* court disagreed, noting that the defendant had on prior occasions inflicted severe injuries on Michael (severely burning his feet) and his sister, Brianna (rendering her a quadriplegic), and there was no evidence the defendant was unaware of the risk his physical abuse of Michael posed to the child's life when his instant physical abuse of Michael resulted in the child's death. (*Id*. at p. 597.)

Defendant argues that here, as in *Evers*, there was substantial evidence that D.H.'s death was the result of his inexperience in handling children, and he did not act with malice when he slapped and choked her in an effort to revive her, assuming that his actions, in combination with D.H.'s carport fall or another earlier fall, resulted in her death. Defendant further argues that the black eye and bruises D.H. suffered while in his care in the motel several months before her death do not "bear any comparison" to the type of severe physical injuries the defendant in *Evers* inflicted on Michael and his sister

Brianna, before the defendant caused Michael's death. Thus, defendant argues he was entitled to an instruction on involuntary manslaughter based on the commission of a lawful act without due cause and circumspection.

Again, we disagree with defendant's analysis. As we have discussed, there was no evidence that D.H.'s death was caused by defendant's slapping and shaking her in an effort to revive her, in combination with any one or more of D.H.'s earlier falls. The only reasonable inference supported by the evidence was that D.H.'s death resulted from defendant repeatedly slamming her head against a hard object on the afternoon of February 4.

Furthermore, there was no evidence defendant was unaware of the risk his actions posed to D.H.'s life. Defendant admitted only that he slapped and shook D.H. in an effort to revive her. His trial testimony and earlier statements revealed no reason why he was or may have been unaware of the risk that slamming D.H.'s head on a hard object posed to her life. (See *Evers, supra,* 10 Cal.App.4th at p. 597 [no evidence of any reason why defendant did not understand the risk his actions posed to child's life].) Thus here, defendant was not entitled to an involuntary manslaughter instruction based on a lawful act committed without due caution and circumspection.

3. Criminal Negligence in Count 3

Defendant claims his conviction in count 3 for felony child abuse or endangerment must be reversed because the trial court failed to "clearly delineate" to the jury that felony child endangerment based on medical neglect -- the prosecution's theory on count 3 -- must involve criminal negligence. We find no error.

Section 273a, subdivision (a) broadly includes both active and passive conduct, that is, child abuse by direct assault and child endangering by extreme neglect. (*People v. Valdez* (2002) 27 Cal.4th 778, 784.)[4] The mens rea element of felony child abuse by direct assault, that is, by direct infliction of unjustifiable physical pain or mental suffering, is general intent. (*Id*. at p. 786; *People v. Sargent, supra,* 19 Cal.4th at pp. 1219-1220, 1224.) In contrast, the appropriate mens rea for felony child endangerment is criminal negligence. (*People v. Valdez, supra,* at p. 788.) "[Criminal] negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . or an indifference to consequences." (*Ibid*.)

As defendant points out, the prosecutor argued count 3 based on a medical neglect theory. That is, the prosecutor argued that defendant was guilty of felony child endangerment based on the evidence that he did not immediately seek medical attention for D.H. after it was apparent she was severely injured. Defendant also notes that the

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[4] Section 273a, subdivision (a) "is an omnibus statute that proscribes essentially four branches of conduct." (*People v. Sargent, supra,* 19 Cal.4th at p. 1215.) It provides: "'Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.'" (*People v. Valdez, supra,* 27 Cal.4th at p. 783.)

instructions on count 3 covered both passive endangerment based on medical neglect and "the general intent abuse alternative, which was the prosecutor's focus" on counts 1 and 2.[5]

This, defendant argues, was error. He reasons: "The bewildering array of similar language as to the various mental states for the various greater and lesser offenses in this case, followed by the concededly inapplicable language on Count 3 for an endangerment count, made it possible the jury could have found felony child abuse without imputing criminal negligence, even if they agreed D.H.'s condition simply deteriorated after one or more accidents, and that [defendant]—a very inexperienced caregiver—did not see the risk from delaying medical care."

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[5] The jury was given CALJIC No. 9.37 which stated, in pertinent part: "[The] defendant is accused in Count 3 of having violated section 273a, subdivision (a) of the Penal Code, a crime. [¶] Every person who, under circumstances or conditions likely to produce great bodily harm or death, willfully inflicts unjustifiable physical pain or mental suffering on a child, or willfully causes or, willfully and as a result of criminal negligence, permits a child to suffer unjustifiable physical pain or mental suffering, or has care or custody of a child and [¶] a[.] willfully causes or, willfully and as a result of criminal negligence, permits the child's person or health to be injured, or [¶] b[.] willfully causes or, willfully and as a result of criminal negligence, permits the child to be placed in a situation where his or her person or health may be endangered, is guilty of a violation of Penal Code section 273a, subdivision (a), a crime."

CALJIC No. 9.37 also defined criminal negligence: "'Criminal negligence' refers to negligent conduct which is aggravated, reckless or flagrant and which is such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for danger to human life or to constitute indifference to the consequences of that conduct. The facts must be such that the consequences of the negligent conduct could reasonably have been foreseen and it must appear that the danger to human life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent conduct."

We reject this argument. First, we disagree that CALJIC No. 9.37 was unclear or confusing, either alone or in combination with the instructions on counts 1 and 2, on the mens rea element of felony child endangerment based on medical neglect. The instruction clearly told the jury that, in order to find defendant guilty of felony child endangerment based on any theory, including medical neglect, it had to find that defendant acted with criminal negligence. The instruction also clearly defined criminal negligence.[6]

At best, defendant's argument amounts to a claim that the trial court failed to give an amplifying or clarifying instruction on its own motion. But the trial court had no such duty. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Defendant raised no objection to CALJIC No. 9.37 in the trial court. Nor did he request clarifying or amplifying language on the criminal negligence element of felony child endangerment based specifically on medical neglect. For these reasons, his claim of instructional error fails.

B. *Separate Punishment Was Properly Imposed on Count 3*

Defendant claims the trial court erroneously refused to stay his sentence on count 3 for felony child endangerment (§ 273a, subd. (a)), in light of his unstayed sentence on count 2 for assault on a child under age eight resulting in death, by means of force likely

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[6] See footnote 5, *ante*.

to produce great bodily injury (§ 273ab).[7] He notes the evidence was undisputed and the medical experts agreed that "[D.H.] was doomed by her injuries, and that earlier treatment would not have saved her from brain death."

Although the medical experts agreed that an earlier report or treatment of D.H.'s injuries would not have saved her life, it does not follow that the trial court erroneously refused to stay defendant's sentence on count 3. The trial court correctly concluded that defendant's act of delaying medical treatment for D.H., the basis of his conviction in count 3, was punishable separately from his acts that caused D.H.'s death, the basis of his convictions in counts 1 and 2.

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) "The purpose of section 654 is to prevent multiple punishment for a single act or omission [or indivisible course of conduct], even though that act or omission [or indivisible course of conduct] violates more than one statute and thus constitutes more than one crime. . . ." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Section 654 is intended to ensure that a defendant's punishment is "commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison, supra*, 48

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[7] As noted, defendant's sentence on count 1 for murder was stayed in view of his unstayed sentence on count 2.

Cal.3d at p. 335.) If the defendant's crimes "were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Multiple punishment is proper, however, where the defendant entertained multiple criminal objectives which were independent of each other. (*People v. Harrison, supra*, at p. 335, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Although the evidence was undisputed that defendant's delays in seeking medical treatment for D.H. and his failure to provide information to medical personnel did not contribute to D.H.'s death, it does not follow that defendant's actions in this regard were not separately punishable from his actions that resulted in D.H.'s death. "[T]he failure to obtain help following an injury of this severity, inferentially to avoid detection of the initial crime, is a separate criminal objective." (*People v. Braz* (1997) 57 Cal.App.4th 1, 12.) Because defendant's delays in seeking medical treatment for D.H. and his failure to provide information to medical personnel were incidental to a separate intent and objective of avoiding responsibility for the crime, the trial court correctly concluded that count 3 was punishable separately from counts 1 and 2.

C. *Amendment of Abstract of Judgment*

Lastly, defendant requests that his abstract of judgment be amended to reflect that he was convicted of second degree murder in count 1. The existing abstract shows he was convicted of murder, but it does not state the degree of the murder conviction. Defendant argues this could be misconstrued as a first degree murder conviction, which

could adversely affect his security rating while in prison. The People agree that the abstract should be so amended.

This court has inherent power to correct clerical errors in court records. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we remand the matter with directions to amend defendant's abstract of judgment to reflect that he was convicted of second degree murder in count 1, and that he was sentenced to a stayed term of 15 years to life on count 1.

IV. DISPOSITION

The matter is remanded with directions to amend defendant's abstract of judgment to reflect that he was convicted of *second* degree murder in count 1 and sentenced to a stayed term of 15 years to life on count 1. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.